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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 GREGORY P. BARNES, ET AL.,

No. C 12-1334 CRB

12 Plaintiffs,

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
PARTIAL SUMMARY JUDGMENT**

13 v.

14 THE HERSHEY COMPANY,

15 Defendant.
16 _____/

17 Now pending is Hershey's motion for partial summary judgment in an age
18 discrimination suit. Hershey argues that it is entitled to summary judgment on (1) Bolle's
19 and Wasson's ADEA claims based on signed release agreements and (2) Barnes' FEHA
20 claim based on failure to exhaust administrative remedies. The Court DENIES summary
21 judgement with respect to the ADEA claims, but would entertain a similar future motion
22 once the record is more complete. The Court GRANTS summary judgment for Hershey with
23 respect to the FEHA claims of Barnes.

24 **I. BACKGROUND**

25 Gregory P. Barnes, David C. Bolle, and Mary D. Wasson ("Plaintiffs") brought suit
26 against The Hershey Company ("Hershey") alleging Plaintiffs were fired as part of a plan by
27 Hershey to terminate "longer-term, older workers." Bolle Decl. (dkt. 53) ¶ 24. Plaintiffs
28 allege that "[u]pwards of twenty older workers were ousted during this particular effort by
Hershey." Id.

Barnes

Barnes joined Hershey in 1983 and worked there until his termination in April 2011. Answer (dkt. 9) ¶ 11. During his career at Hershey, Barnes held the positions of District Account Supervisor, District Manager, District Account Manager, and Senior Regional Analyst while being promoted or transferred several times, including stints in Nashville, Kansas City, Atlanta, and Houston. Answer ¶¶ 15, 20, 22, 24, 26. According to Plaintiffs, six months after Barnes disclosed that his wife had breast cancer, Hershey terminated his position and offered him relocation to Pleasanton, CA, which Barnes could not accept because of his wife's medical care requirements. Barnes Decl. (dkt. 52) Ex. E ¶ 11. Barnes unsuccessfully applied to two other positions within Hershey after being notified of his pending termination. Answer ¶¶ 35-36. Following Barnes' termination, he filed charges of discrimination with the Pennsylvania Human Relations Commission, Texas Workforce Commission Civil Rights Division, and the EEOC. Barnes Charge of Discrimination (dkt. 48) Ex. 5.

Bolle

Bolle joined Hershey in 1994 and worked there until his termination in September 2010. Bolle Decl. ¶ 4. Bolle worked in several positions during his time at Hershey, including District Account Supervisor, Category Development Manager (CDM), and Manager of Category Development (MCD). Id. ¶¶ 7-8, 10. In August 2008, Bolle was placed on a 90-day performance improvement plan. Id. ¶ 12. A 90-day extension of that performance improvement plan followed. Id. ¶ 13. Hershey transferred Bolle to a CDM position, a demotion, id. ¶ 16; Answer ¶ 54, and then terminated him in September 2010, id. ¶ 18.

Bolle signed a separation agreement with Hershey on October 7, 2010. Bolle Separation Agreement (dkt. 48) Ex. 2. In November 2011, Bolle filed charges of discrimination with the Pennsylvania Human Relations Commission, Colorado Civil Rights

1 Division, and the EEOC, which alleged that “the severance agreement is not valid.” Bolle
2 Charge of Discrimination (dkt. 48) Ex. 4.

3 Wasson

4 Wasson joined Hershey in 1991 and worked there until her termination in May 2010.
5 Answer ¶¶ 60, 75. While at Hershey, Wasson worked as a Customer Sales Executive.
6 Wasson Decl. (dkt. 52) Ex. D ¶ 4. After Hershey terminated Wasson, she signed a separation
7 agreement in June 2010. Wasson Severance Agreement (dkt. 48) Ex. 1. Later, Wasson filed
8 a charge of discrimination with the Pennsylvania Human Relations Commission, Tennessee
9 Human Rights Commission, and the EEOC in February 2011. Wasson Charge of
10 Discrimination (dkt. 52) Ex. H.

11 Following Plaintiffs’ Complaint and Defendant’s Answer, the parties had an initial
12 case management conference on August 24, 2012. Mins. (dkt. 46). Defendant filed this
13 motion for partial summary judgment on September 7, 2012, shortly after discovery
14 commenced.

15 **II. LEGAL STANDARD**

16 A principal purpose of the summary judgment procedure is to isolate and dispose of
17 factually unsupported claims. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The
18 party moving for summary judgment has the burden to show initially the absence of a
19 genuine issue concerning any material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144,
20 159 (1970). Once the moving party has met its initial burden, the burden shifts to the
21 nonmoving party to establish the existence of an element essential to that party's case, and on
22 which that party will bear the burden of proof at trial. See Celotex, 477 U.S. at 323-24. To
23 discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must
24 have evidence showing that there is a genuine issue for trial. See id. at 324.

25 Special rules of construction apply to evaluating summary judgment motions: (1) all
26 reasonable doubts as to the existence of genuine issues of material fact should be resolved
27 against the moving party; and (2) all inferences to be drawn from the underlying facts must
28 be viewed in the light most favorable to the nonmoving party. T.W. Elec. Serv., Inc. v. Pac.

1 Elec. Contractors Ass'n., 809 F.2d 626, 630-31 (9th Cir. 1987). Further, admissions in an
 2 opposing party's pleadings are admissible evidence and can serve as a basis for summary
 3 judgment. Lockwood v. Wolf Corp., 629 F.2d 603, 611 (9th Cir. 1980).

4 **III. DISCUSSION**

5 **A. Release Agreements of Bolle and Wasson**

6 In a dispute over the validity of a waiver, the Older Workers Benefit Protection Act
 7 ("OWBPA") requires that "the party asserting the validity . . . shall have the burden of
 8 proving . . . that a waiver was knowing and voluntary." 29 U.S.C. § 626(f)(3). To be
 9 knowing and voluntary, a waiver must conform to the OWBPA's statutory requirements.¹
 10 Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426-27 (1998). The requirement disputed
 11 here is whether Hershey was required to give Plaintiffs 21 days or 45 days to consider the
 12 agreement before signing it. See 29 U.S.C. § 626(f)(1)(F).

13 Employers must provide 45 days notice when the waiver is "in connection with an
 14 exit incentive or other employment termination program offered to a group or class of
 15 employees." 29 U.S.C. § 626(f)(1)(F). Additionally, if the waiver was "in connection with
 16 an exit incentive or other employment termination program," employers must provide other
 17 information about the individuals who are part of the group. Id. § 626(f)(1)(H). It is
 18 undisputed that Hershey gave Bolle and Wasson less than 45 days to sign the agreements,
 19 and did not provide any information about other people terminated. Mot. at Ex. 1 ¶ 14, Ex. 2
 20 ¶ 14 (clause allowing twenty-one days within which to consider the agreement).

21 There is no clear definition of what constitutes "an exit incentive or other employment
 22 termination program" under 29 U.S.C. § 626(f)(1)(H). Thiessen v. GE Capital Corp., 232 F.
 23 Supp. 2d 1230, 1240 (D. Kan. 2002) ("The statute itself does not define 'exit incentive' or

24
 25 ¹OWBPA's statutory requirements are: (1) the waiver is written to be understood by the
 26 individual signing; (2) the waiver specifically references claims under the act; (3) the individual does
 27 not waive rights arising after the date of execution; (4) the individual receives consideration in addition
 28 to what he/she is already entitled; (5) the individual is advised in writing to consult with an attorney
 before executing the waiver; (6) the individual is given 21 days, or 45 days in connection with an exit
 incentive or other employment termination program, to consider the agreement; (7) the agreement
 provides a period of at least 7 days following execution of the agreement during which the agreement
 may be revoked; and (8) additional information must be supplied if the waiver is in connection with an
 exit incentive or other employment termination program. 29 U.S.C. § 626(f)(1).

1 ‘employment termination program’ and very few cases have analyzed the meaning of the
2 phrases.”). The legislative history of the OWBPA provides:

3 Individual separation agreements are the result of actual or expected adverse
4 action against an individual employee. The employee understands that action is
5 being taken against him, and he may engage in arms-length negotiation to resolve
any differences with the employer.

6 Group termination and reduction programs stand in stark contrast to the individual
7 separation. During the past decade [the 1980s], in particular, employers faced
8 with the need to reduce workforce size have resorted to standardized programs
9 designed to effectuate quick and wholesale reductions. The trademark of
10 involuntary termination programs is a standardized formula or package of
11 employee benefits that is available to more than one employee. The trademark of
12 voluntary reduction programs is a standardized formula or package of benefits
designed to induce employees voluntarily to sever their employment. In both
cases, the terms of the programs generally are not subject to negotiation between
the parties. In addition, employees affected by these programs have little or no
basis to suspect that action is being taken based on their individual characteristics.
Indeed, the employer generally advises them that the termination is not a function
of their individual status. Under these circumstances, the need for adequate
information and access to advice before waivers are signed is especially acute.

13 S. Rep. No. 101-263, at 32 (1990).

14 Further, EEOC regulations indicate that whether a program exists is a question of fact
15 that should be determined on a case by case basis.

16 [T]he existence of a “program” will be decided based upon the facts and
17 circumstances of each case. A “program” exists when an employer offers
18 additional consideration for the signing of a waiver pursuant to an exit incentive
19 or other employment termination (e.g., a reduction in force) to two or more
20 employees. Typically, an involuntary termination program is a standardized
21 formula or package of benefits that is available to two or more employees, while
an exit incentive program typically is a standardized formula or package of
benefits designed to induce employees to sever their employment voluntarily. In
both cases, the terms of the programs generally are not subject to negotiation
between the parties.

22 Waivers of Rights and Claims under the ADEA, 29 C.F.R. § 1625.22(f)(1)(iii)(B).

23 EEOC’s regulations also note that termination program can be phased and take place
24 over time:

25 An involuntary termination program in a decisional unit may take place in
26 successive increments over a period of time. Special rules apply to this situation.
27 Specifically, information supplied with regard to the involuntary termination
28 program should be cumulative, so that later terminees are provided ages and job
titles or job categories, as appropriate, for all persons in the decisional unit at the
beginning of the program and all persons terminated to date. There is no duty to
supplement the information given to earlier terminees so long as the disclosure,
at the time it is given, conforms to the requirements of this section.

1 29 C.F.R. § 1625.22(f)(4)(vi).

2 Little in the record indicates whether the benefits offered to the parties were
3 standardized or whether the terms of the separation agreements were negotiated between the
4 parties. Hershey provides evidence of a letter from Wasson's attorney to Hershey, which
5 indicates an attempt to negotiate. Mot. at Ex. 3. But, the severance payment Wasson
6 received was the payment initially offered to her, indicating that Wasson's attempts to
7 negotiate were unsuccessful. *Id.* at 2, Ex. 3. The burden is on Hershey to establish that the
8 waiver is valid, and it has not adequately developed the record regarding the standardization
9 and negotiation between the parties.

10 Plaintiffs allege that they were fired for reasons unrelated to performance, while
11 Defendant claims that all Plaintiffs were fired for substandard performance. Opp'n at 5-6;
12 Mot. at 2. This is a dispute as to facts, and few facts are currently in the record. Discovery
13 began only two weeks before this motion was filed² and, to date, the Court is unaware of any
14 response to Plaintiffs' requests for production, which included "[a]ll DOCUMENTS
15 concerning ANY plans or goals to sever CSEs or CDMs in 2009 through 2011 or ANY other
16 termination program or plan to severe [sic] CSEs and CDMs in 2009 through 2011" and
17 requests for documents related to Plaintiffs' records and Defendant's alleged "age blocking."
18 Opp'n at Ex. I.

19 At oral argument, Plaintiffs argued that the Court should grant summary judgment
20 despite the dearth of facts in the record because the alleged "age blocking," even if proved,
21 would still be distinguishable from a traditional reduction-in-force program, and so would
22 not qualify under the statute. The legislative history indicates that large-scale reductions in
23 force do qualify as employment termination programs, S. Rep. No. 101-263, at 32 (1990), but
24 the language of the statute and of the corresponding regulations permit a broader reading.
25 The Court needs more facts surrounding these terminations before making a determination as
26 to whether an exit incentive or other termination program existed.

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28 ²Defendant argues that Plaintiff did not properly comply with Rule 56(d), which requires an
affidavit or declaration to present facts it needs in asking for a delay in further discovery; however,
Plaintiffs' Declaration of Brian J. Malloy did just that. Opp'n Ex. A ¶¶ 11-14.

Accordingly, the Court DENIES the motion for summary judgment as to the ADEA claims.

B. Failure to Exhaust Administrative Remedies of Barnes and Bolle

In order to properly bring an action based on the California Fair Employment and Housing Act (“FEHA”), a plaintiff must first exhaust administrative remedies. Romano v. Rockwell Int’l Inc., 14 Cal. 4th 479, 492 (1996). A plaintiff exhausts administrative remedies by filing a complaint with the California Department of Fair Employment and Housing (“DFEH”) within one year of the occurrence of the alleged conduct, and the DFEH then provides what is commonly referred to as a “right to sue” letter. See Cal. Gov’t Code § 12960(b) & (d); id. § 12965(b).

Plaintiffs argue that Barnes exhausted his administrative remedies because the DFEH and the EEOC have a work-sharing agreement whereby complaints filed with the EEOC are automatically filed with the DFEH, and Barnes filed with the EEOC. Opp’n at 20. Hershey responds that because Barnes’ EEOC Charge of Discrimination directed cross-filing with the state agencies in Texas and Pennsylvania—but not California—Barnes demonstrated that he did not intend to file with the DFEH in California and, consequently, his administrative remedies were not exhausted for purposes of FEHA. Reply at 11-12.

It is true that EEOC and DFEH have a work-sharing agreement such that each has designated the other as its “agent for receiving charges and agreed to forward to the other agency copies of all charges potentially covered by the other agency's statute.” Downs v. Dept. of Water & Power, 58 Cal. App. 4th 1093, 1097 (1997). Regulations provide, and courts have held, that filing a complaint with the DFEH is sufficient to provide notice to the EEOC. 29 C.F.R. § 1626.10(c); Reed v. UBS Secs., LLC, No. C 09-5237 MHP, 2010 WL 3119200, at *6 (N.D. Cal. Aug. 3, 2010). But, the question here is whether Barnes’ filing with the EEOC satisfied FEHA’s administrative exhaustion requirement.

California courts have held that for an employee to assert FEHA claims, the employee must bring her charges to the DFEH in some manner. For example, in Martin v. Lockheed Missiles & Space Co., the court held that

[a]bsent any showing that [the employee] filed her amended charge, or caused it to be filed, with the DFEH, or that the DFEH had actual notice of the amended charge from any other source, there is no basis for an assertion that [the employee] could predicate her lawsuit on the DFEH's inaction (in lieu of better evidence that she had exhausted her administrative remedies).

29 Cal. App. 4th 1718, 1727 (Ct. App. 1994); see also id. at 1729-30 (“If [the employee] wished to avail herself of state judicial remedies for her . . . claims, it was essential that she undertake by reasonable means to make the . . . claims known to the DFEH.”); see also Alberti v. City & Council of S.F. Sheriff's Dept., 32 F. Supp. 2d 1164, 1174 (N.D. Cal. Nov. 25, 1998).

Here, Barnes’ Charge of Discrimination specifically lists state agencies in Pennsylvania and Texas, as well as the EEOC, in the section of the Charge of Discrimination form asking the person filing the charge to list the “State or local Agency, if any.” Mot. at Ex. 5. Plaintiffs do not claim the DFEH ever communicated with them about their claims, as occurred in cases cited by Plaintiffs. Salgado v. Atlantic Richfield Co., 823 F.2d 1322, 1323 (9th Cir. 1987) (stating that Salgado received a “right-to-sue” letter from DFEH eleven days after the complaint was filed with the EEOC); Downs, 58 Cal. App. 4th at 1097 (stating that Plaintiff received a letter from DFEH acknowledging that the claim had been filed with the state).

Further, in the only case Plaintiffs cite where a court found exhaustion after the employee filed with the EEOC but did not receive any communication from the DFEH, the court noted that the “State or local agency” field was left blank but the charge itself said that the employee lived in California and wanted to file “with both the EEOC and the State or local Agency.” Reed, 2010 WL 3119200, at *2-3, 8 (N.D. Cal. Aug. 3, 2010).

Assuming Reed was correct, this case is different: Barnes’ charge only referenced California in noting that Barnes had turned down a position in California. Mot. at Ex. 5. But, Barnes specifically indicated that the charge should be filed with the Pennsylvania Human Relations Commission and the Texas Workforce Commission Civil Rights Division, and Barnes provided a home address in Texas and his employer’s address in Pennsylvania.

1 Nothing in the EEOC Charge of Discrimination suggested that the EEOC charge should have
2 been cross-filed with the DFEH.

3 As for the policy rationales underlying administrative exhaustion,

4 [t]he exhaustion requirement serves the important policy interests embodied in the
5 act of resolving disputes and eliminating unlawful employment practices by
6 conciliation [], as well as the salutary goals of easing the burden on the court
7 system, maximizing the use of administrative agency expertise and capability to
8 order and monitor corrective measures, and providing a more economical and less
9 formal means of resolving the dispute.

10 Royo v. Kliger, 52 Cal. 3d 65, 83 (1990). Arguably, a filing with the EEOC addresses these
11 rationales—but so would a filing with any state agency or administrative body around the
12 country, and the California case law cited above suggests that California does not take the
13 position that any administrative review will do. Instead, California requires that its own
14 administrative body receive and review the charge (or at the very least have had good reason
15 to do so based on administrative filings with a cooperating entity) before an aggrieved
16 employee can bring suit.


17 Barnes failed to exhaust his administrative remedies, and Hershey's motion for partial
18 summary judgment on his FEHA claim is GRANTED.

19 IV. CONCLUSION

20 For the foregoing reasons, the Court DENIES the motion for partial summary
21 judgment on Bolle's and Wasson's ADEA claims until the record is more developed as to
22 whether a group termination plan existed, and GRANTS the motion for partial summary
23 judgment on Barnes' FEHA claim based on his failure to exhaust administrative remedies.

24 **IT IS SO ORDERED.**

25 Dated: November 5, 2012

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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE